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March 3, 1992

The Honorable Ruth Eskesen
Arizona State Representative
1700 W. Washington
Phoenix, Arizona 85007

Re: I92-003 (R92-003)

Dear Representative Eskesen:

You have asked whether the pilot project proposal that would allow the Clerk of the Maricopa County Superior Court to assume responsibility for child support enforcement services in all IV-D^{1/} cases in Maricopa County violates Arizona law. The Title IV-D program is charged with representing the public's interests in seeing that parents support their children to relieve the burden on taxpayers.^{2/} The essential functions of the IV-D program are the establishment of paternity, and the establishment, modification, and enforcement of child support orders. The proposal requires that the clerk perform the following functions, pursuant to a contract with the Arizona Department of Economic Security (DES):^{3/}

1. Case intake;
2. Locating parents and seeing that process is served;
3. Collecting and disbursing payments;
4. Establishing paternity;
5. Establishing child support;
6. Enforcing existing child support orders; and
7. Modifying child support orders;

^{1/}Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669.

^{2/}The public's interests do not always coincide with those of the custodial parent. See Federal Register, Volume 55, No. 158, p. 33418 (August 15, 1990).

^{3/}Federal regulations require that each state designate a separate organizational unit to administer the IV-D plan. 45 C.F.R. § 302.12. When Title IV-D was enacted, DES was designated by the legislature as the IV-D agency. A.R.S. § 41-1952.

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We conclude that the proposal, taken as a whole, violates both the Code of Judicial Ethics and the separation of powers doctrine set forth in Article III of the Arizona Constitution.

Article III sets forth the required separation among the branches of Arizona's government:

The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Under the constitutional scheme, the legislature is invested with the power and duty to pass laws. Ariz. Const. art. 4, Pt. 2, § 1. The Governor, the head of the executive branch, is charged with the duty of ensuring that the laws are faithfully executed. Ariz. Const. art. V, § 4; Ahearn v. Bailey, 104 Ariz. 250, 253, 451 P.2d 30 (1969). The judiciary is charged with the responsibility for determining the constitutionality of legislation and impartially administering justice in the cases brought before it. State v. Prentiss, 163 Ariz. 81, 85, 786 P.2d 932 (1989). For example, in the criminal context, the legislature defines the acts constituting a crime and prescribes the punishment; the executive branch decides what charges, if any, will be filed, whether to proceed after the charges have been filed, and whether to allege facts authorizing an enhanced sentence; and the judiciary impartially determines the charge, once filed. See State v. Dykes, 163 Ariz. 581, 789 P.2d 1082 (App. 1990).

The doctrine of separation of powers is fundamental to the proper operation of government. Ahearn, 104 Ariz. at 253; State v. Jones, 142 Ariz. 302, 689 P.2d 561 (App. 1984). Its purpose is to prevent the concentration of power in one branch of government. State v. Wagstaff, 164 Ariz. 485, 489, 794 P.2d 118, 122 (1990); Dykes, 163 Ariz. at 583; Prentiss, 163 Ariz. at 81.

With regard to child support, the legislature has prescribed the duty to support one's children^{4/} and the legal remedies available to enforce that duty. The executive branch, through the

^{4/}A.R.S. § 12-2451(A) provides "[E]very man and woman shall have the duty to provide all reasonable support for his or her natural and adopted minor, unemancipated children. . . ."

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DES,^{5/} has the power to decide what legal remedy should be invoked to establish, modify, or enforce child support orders and against whom to file a lawsuit should paternity be at issue. The judiciary has the power to determine factual disputes and to enter orders once its jurisdiction has been invoked by the filing of a pleading.

The proposal under consideration would transfer to the Clerk of the Maricopa County Superior Court the IV-D child support enforcement program in Maricopa County. To determine the propriety of the transfer, we must look at the functions of the IV-D program.

The key functions of the IV-D program are the establishment of paternity, and the establishment, modification, and enforcement of child support orders. Inherent in performing these functions are choices among legal remedies, the initiation and prosecution of court action, and decisions regarding what positions to take based on the facts and the law. These are enforcement decisions involving the exercise of discretion, not ministerial functions.

For example, in paternity cases there are alternative means of proceeding where the putative father resides out of state, each requiring analysis of such legal issues as personal jurisdiction. If the proposed defendant has minimum contacts with Arizona, long arm-jurisdiction may be invoked. Alternatively, a URESA action may be initiated. If the mother alleges that one man is the father, but admits intercourse with other men in the forty-five days before conception, the attorney must decide whether to proceed against more than one defendant. The decision must also be made as to the amount to allege for past care and support of the child, both on behalf of the mother and on behalf of the state, where AFDC has been expended. These are all enforcement decisions.

In establishment cases, decisions bearing legal consequences must be made as to how to proceed.^{6/} If, for example, the parties were divorced in Arizona, no support order was entered, and the noncustodial parent resides out of state, the decision arises whether to move to modify the Arizona decree, to file a URESA

^{5/}Represented by either the county attorney or the attorney general, A.R.S. § 12-245; see also A.R.S. §§ 12-843, 25-323, 12-2452-2454.

^{6/}Nationally, more than 40% of the 9.4 million mothers with minor children whose fathers are not present in the household have not been awarded child support. Fourteenth Annual Report to Congress for the period ending September 30, 1989. In AFDC cases, which comprise approximately 50 percent of the state's IV-D caseload, the figure is even higher. More than 50% of the AFDC caseload involves out-of-wedlock births. Thus, enforcement of existing court orders is only a portion of the IV-D responsibility.

action, or to file a local independent action. Factual issues arise in establishment cases in conjunction with the interpretation and application of the guidelines, such as

- a. whether to give credit for visitation expenses, and, if so, in what amount;
- b. whether to give credit for child care expenses, and, if so, in what amount;
- c. whether to allow deductions for health insurance premiums, where the premiums cover the obligor and his new family; and
- d. in determining gross income, whether bonuses or other sporadic income should be included.

In selecting the vehicles for enforcement, options and procedures often can be combined: URESA, tax intercept, wage assignment, garnishment of a bank account, attachment of and execution on real or personal property, civil or criminal contempt or a criminal charge of failure to provide support. Difficult factual and legal issues also arise involving bankruptcy, waiver of accrued support, whether credit against arrearages should be given for direct payments, whether the statute of limitations has run, and whether support must be paid for the period when the parties lived together.

All these decisions require investigation of the facts, knowledge of the law, application of the law to the facts, determination of the proper legal positions to assert, and the choice of legal remedy. The propriety of a transfer of child support enforcement to the judicial branch of government, as the clerk proposes, must be viewed against this factual background.

The clerk of the court is part of the judicial branch of government, Ariz. Const. art. VI, § 23, subject to the supervision of the judiciary. Roylston v. Pima County, 106 Ariz. 249, 475 P.2d 233 (1970). The clerk is responsible for the filing of court documents and maintenance of court records and for attending court and keeping minutes.^{1/} The duties of the clerk are an integral part of the judicial process. U.S. Fidelity and Guaranty Co. v. State, 63 Ariz. 212, 177 P.2d 823 (1947).

Since the judge has supervisory authority over the clerk, the court's ability to impartially administer justice would be compromised by allowing the clerk to establish, enforce, and modify child support and paternity orders. Both the "prosecutor" and the judge would be part of the same team--the judiciary. The proposal thus would do violence to the concept of an independent judiciary

^{1/}A.R.S. §§ 12-282, 283; Ariz. R. Civ. P. 77, 79.

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and would impermissibly concentrate power in one branch of government, creating the potential for the very evils the separation of powers doctrine was designed to prevent.

In two recent decisions, the Supreme Court has examined whether the powers of the executive and judicial branches have been impermissibly intertwined. State v. Wagstaff, 164 Ariz. 485, 794 P.2d 118 (1990); State v. Lyons, 167 Ariz. 15, 804 P.2d 744 (1990). In each, the decision turned upon whether the function at issue traditionally had been vested in the executive or the judicial branch.

In Wagstaff, the court found a violation of separation of powers in a statute giving concurrent jurisdiction to the court and the parole board, an executive agency. This is precisely what the proposal in question requires: concurrent jurisdiction between DES, an executive agency, and the Clerk, a judicial agent. Under the rationale of Wagstaff, the proposal would fail.

In Lyons, however, the Supreme Court found that a statute providing for lifetime probation did not violate the separation of powers doctrine. 167 Ariz. at 17, 804 P.2d at 746. The court reasoned that since, by statute, probation officers are part of the judicial branch, no impermissible usurpation of power occurred because probation officers merely assist the court in carrying out the court's orders. As a practical matter, probation officers' work begins only after criminal convictions have been entered and sentences imposed, and the defendants have been deprived of many of their civil rights.

Several factual and legal distinctions prevent the rationale in Lyons from controlling this inquiry. First, the underlying statutory scheme authorizing probation officers differs from the statutes authorizing child support enforcement. Unlike probation, child support enforcement traditionally has been vested in the executive branch of government^{8/} and has been performed solely by the county attorney and the attorney general.^{2/} Thus, the underlying statutory frameworks differ. Probation is vested in the judiciary, whereas child support enforcement is vested in the executive.

^{8/}Since 1953, the executive branch of government has been charged with the responsibility for child support enforcement. See Ariz. Rev. Stat. Ann. §§ 27-818-904 (Laws 1953, Ch. 34) (URESA). See also Ariz. Rev. Stat. Ann. §12-841 (Laws 1971, Ch. 163 § 2, amended 1985) (paternity).

^{2/}Ariz. Rev. Stat. Ann. § 12-2456. See also Ariz. Rev. Stat. Ann. §§ 12-843, 25-323, 12-2452-2454.

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The duties, too, differ. The probation officer is required to maintain contact with his probationer and to see that she performs the conditions of her probation. Similarly, in child support enforcement, the clerk maintains records of payment of support.^{10/} There, however, the similarity ends. In most IV-D cases, no underlying Arizona support order exists, and an action must be initiated to determine whether an order should be entered defining and fixing legal obligations. In other IV-D cases, paternity has not been established. Even in cases in which a support order exists, decisions must be made regarding whether to seek to modify it or how best to enforce it. See supra. Thus, the work of IV-D enforcement is not merely to oversee existing court orders. Establishing paternity, and establishing, modifying, and enforcing child support obligations involve affirmative enforcement duties.

We conclude that child support enforcement is a prosecution or enforcement function that protects and vindicates the public's interests. It is properly part of the executive branch of government.^{11/}

In discussing the separation of powers doctrine, the Arizona Supreme Court has noted with approval that

there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

1 F. Cooper, State Administrative Law 15-16 (1965), quoting IX L'Esprit Des Lois 215-17 (1750) (Montesquieu).

^{10/}Although the first three functions assigned to the clerk under the proposal at issue--intake, locating parents and seeing that process is served, and accepting and disbursing child support payments--seem to be merely clerical functions properly assigned to the clerk of the court, see Ariz. Rev. Stat. Ann. §§ 12-282, 12-283; Ariz. R. Civ. P. 79, the last four functions--enforcing existing child support orders, petitioning to modify existing support orders, and establishing paternity and child support--are clearly enforcement functions, properly vested in the executive branch of government.

^{11/}Ariz. Const., Art. V, § 9, A.R.S. § 41-1191; A.R.S. § 11-532. See also Prentiss, 163 Ariz. at 84, 786 P.2d at 935.

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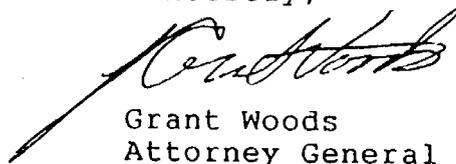
J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors, 142 Ariz. 400, 404, 690 P.2d 119, 123 (App. 1984).

The threat raised by the pending proposal is that it removes several aspects of child support enforcement from the executive branch, where it now resides, and places it in the judicial branch of government or, as Montesquieu more eloquently phrases it, gives the judicial branch the power to "behave with all the violence of the oppressor." Id. A greater threat in modern society is that placing an enforcement function within the judicial branch threatens the impartiality of the judicial branch of government.

Inherent in our system of justice is the independence and impartiality of the court. The Code of Judicial Conduct, Ariz. Rules of Supreme Court, Rule 81, is directed toward this end.^{12/} It is the impartiality required of the judiciary that renders it inappropriate for judges, Ariz. Rules of the Supreme Court, Rule 81, Canon 5, and clerks, A.R.S. § 12-281, to give legal advice. The independence of the judiciary^{13/} is an important part of our system of government. Broomfield v. Maricopa County, 112 Ariz. 565, 544 P.2d 1080 (1975).

We conclude that the separation of powers doctrine of Article III of the Arizona Constitution and the Code of Judicial Conduct do not permit the Clerk of the Court to operate a program to establish, enforce and modify child support pursuant to a contract with DES.

Sincerely,



Grant Woods
Attorney General

^{12/}Canon 1 provides: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this code should be construed and applied to further that objective." Canon 3 required that a judge impartially perform the duties of his office.

^{13/}The separation of powers violation is rendered more obvious by the fact that the federal funding for IV-D enforcement varies depending upon the success of the IV-D collection efforts. Thus, in effect, the judicial branch would have a direct financial stake in the awards it would make in IV-D cases. 45 C.F.R. § 303.52.